NATIONAL LABOR RELATIONS BOARD

NBCUNIVERSAL MEDIA, LLC, **Employer,**	:	
vs.	:	Case No. 02-UC-000619 Case No. 13-UC-000417 Case No. 31-UC-000323
NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS-COMMUNICATION WORKERS OF AMERICA, AFL–CIO, LOCAL 11,	:	
NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS-COMMUNICATION WORKERS OF AMERICA, AFL–CIO, LOCAL 41,	:	
NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS-COMMUNICATION WORKERS OF AMERICA, AFL–CIO, LOCAL 53, **Petitioners.**	:	

REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S SECOND SUPPLEMENTAL DECISION BY NBCUNIVERSAL MEDIA, LLC

April 30, 2021

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NBCUniversal Media, LLC ("NBCU" or the "Company") submits this Request For Review of the Regional Director's Second Supplemental Decision in this matter, pursuant to Rule 102.67 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"). For the reasons set forth below, the standard for Board Review is met and review should be granted with respect to the unit clarification petitions of the National Association of Broadcast Employees and Technicians – Communications Workers of America, AFL-CIO ("NABET," the "Union," or the "Sector"), Locals 11, 41, and 53 (respectively, "Local 11," "Local 41," and "Local 53," and collectively, the "Locals") in this matter.

PRELIMINARY STATEMENT

For over a decade this case was derailed by NABET and the Regional Directors' erroneous position that the Union represented employees at NBCU in a non-existent, single nationwide bargaining unit – causing years of unnecessary litigation, expense, and prejudice to NBCU. The Board reached the proper conclusion in July 2020 when it held that no such unit existed, reversed prior Regional decisions and dismissed NABET's nationwide petition, and as a result reinstated and remanded the petitions of the Locals.

Now, in the face of the Board's July 2020 ruling and reinstatement of the three facially deficient Petitions filed by Local 11 in New York, Local 41 in Chicago, and Local 53 in Los Angeles each calling for Content Producers to be clarified into two separate and distinct bargaining units (the "Local Petitions"), the Regional Director has reached the same erroneous decision that the Board just reversed. According to the Regional Director, Content Producers – with their wide variety of job functions covering non-unit work and work in multiple NABET bargaining units at NBCU – somehow should be clarified into NABET's "A Unit." In doing so, however, the Regional Director relied on evidence of the job functions of all of the various NABET units at issue – effectively treating all NABET represented employees, once again, as a

single, integrated, nationwide unit. Moreover, the Regional Director reached this conclusion based on a completely stale record of evidence; a record that was developed over the decade when this case was litigated under an entirely different premise. The Regional Director has also ignored facial deficiencies in each of the Local Petitions. Granting these petitions and clarifying Content Producers into the NABET "A Unit," for reasons discussed herein, is a clearly erroneous decision warranting review.

At the outset, it is clear that the Local 11 Petition cannot survive, because Local 11 executed an agreement that explicitly and inarguably waived its right to represent Content Producers. Any other interpretation ignores the plain language that the parties agreed to when they entered into that agreement.

The Local Petitions are also deficient because they each seek clarification of the Content Producer position into two totally different units without specifically identifying which employees would go into which bargaining unit. Such an approach ignores the requirement for a clarification petition to specify the appropriate unit for clarification, and it was plain error for the Regional Director to ignore the deficiencies. As a result, the Local Petitions should have been dismissed because they are deficient on their face. Alternatively, if the Local Petitions are not dismissed (which they should be), they should be severed and referred to the Region of their origination for further processing and hearing consistent with Board rules.

If the Local Petitions are not dismissed on procedural grounds given their facial deficiencies, which they should be, then the Regional Director's decision to clarify Content Producers into the NABET "A Unit" was clearly erroneous. As noted above, the Regional Director's decision relies on the same flawed analysis that the Board expressly rejected, namely, that there exists a single, integrated, nationwide NABET unit. While stating in a conclusory

manner that his decision is consistent with the Board's July 2020 decision, the Regional Director nonetheless relies on past Regional decisions – operating under the very framework that the Second Circuit Court of Appeals and the Board rejected – as evidence for the job functions of Content Producers. The Regional Director then states, without citing to the record at all, that under *Premcor* the Content Producers can be clarified into the NABET "A Unit." This is erroneous and improper, because the Regional Director has again conflated functions from multiple separate NABET bargaining units as a way of using *Premcor* to conjure a conclusion that is not rooted in the facts of this case.

Under a legitimate *Premcor* analysis, and one that relies on actual evidence and not just past decisions when the focus of this case was entirely different, it would be abundantly clear that the Content Producers do not perform the same essential job functions as members of the "A Unit." Rather, they perform a wide variety of job functions spanning from the A Unit, to the H, M and N newswriter units, and, importantly, primarily non-unit Producer work. Under *Premcor*, then, the Regional Director should have gone further and conducted a full community of interest analysis. He did not, which is clear error.

Finally, to the extent the Local Petitions are not dismissed, changed circumstances — namely changes in the role of the Content Producer over time and with the progression of technology and media — clearly prohibits a clarification finding based on a decade-old evidentiary record. By rejecting NBCU's request to reopen the record, the Regional Director has threatened the Section 7 rights of Content Producers, who, under his Second Supplemental Decision would be clarified into the NABET A Unit based on stale descriptions of the work by individuals who either are no longer involved in the workflow at all or themselves no longer perform the work in the same way. In order to hear the new evidence regarding the nature of the

changes in the Content Producer position, and how those changes materially impact any clarification analysis, the Board should, absent dismissal, reopen the record and permit further hearing and litigation.

Indeed, clarifying the Content Producers position in this way without further proceedings would only lead to even more prejudice than what NBCU has already experienced in being hampered by years long litigation on an issue that had no basis in fact or law. In light of the importance of the Board's statutory responsibility to protect the Section 7 rights of the existing Content Producers, especially since the clarification petitions would require union membership without an election or any other valid showing of majority support, the objective should be to assess these Local Petitions upon consideration of the most timely and factually accurate evidence. Nearly ten years has passed since the issuance of the 2011 Regional decision, and additional evidence establishing the evolution of the Content Producer position during that period is necessary to conduct a factually and legally sound clarification analysis. The new evidence is, thus, vital to any unit clarification decision.

BACKGROUND

I. Procedural History

The parties began litigating this matter in 2009, when various NABET local organizations, including Local 11, Local 41, Local 53, and Local 31 in Washington, D.C. each filed unit clarification petitions. The NABET Sector filed its own separate unit clarification petition months later in December 2010. NABET's goal then remains the same now: to add Content Producers to the scope of NABET's representation at NBCU.[1]

[1]Case Nos. 02-UC-000625 (the NABET Sector petition) and 05-UC-000403 (the Local 31 petition) have since been dismissed.

Specifically, each Local sought to add the Content Producers to NABET-represented bargaining units at four NBCU-owned local televisions stations. The NABET Sector petition did not specify to which individual bargaining unit the Content Producers should be added.

After the Board's consolidation of the cases and an extensive factual hearing, Acting Regional Director ("ARD") Elbert Tellem of NLRB Region 2 issued a decision on October 26, 2011, granting NABET's unit clarification petitions, and ordered NBCU to bargain with NABET regarding the Content Producer position – based on an erroneous finding that there was a single nationwide unit into which the Content Producers could be clarified. *NBC Universal, Inc.*, Case No. 02-UC-000619 (Oct. 26, 2011) ("Initial UC Decision"). On September 25, 2013, the Board denied NBCU's request for review.

On October 28, 2013, NABET filed an unfair labor practice charge alleging a violation of Sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or "Act") based on NBCU's refusal to bargain. *NBC Universal, Inc.*, Case No. 02-CA-115732 (Oct. 28, 2013). The Board issued a Decision and Order on April 7, 2014, as amended on May 2, 2014, enforcing the bargaining order. *NBC Universal, Inc.*, 360 NLRB 633 (2014).

On April 15, 2014, NBCU petitioned the United States Court of Appeals for the District of Columbia Circuit for review pursuant to Section 10(f) of the NLRA. 29 U.S.C. § 160(f). The Board filed a Cross-Application for Enforcement. On February 23, 2016, the Court of Appeals denied both NBCU's Petition for Review and the Board's Cross-Application for Enforcement, and remanded this proceeding to the Board. *NBCUniversal Media, LLC v. NLRB*, 815 F.3d 821 (D.C. Cir. 2016). The court instructed the Board to clarify its rationale underlying the Initial UC Decision, calling the Board's decision "incomprehensible," and explaining that the court could not "decipher . . . how the Board determined that all NBCU employees represented by NABET

are part of a single, nationwide bargaining unit." *Id.* at 823. The court also instructed the Board to "address the parties' dispute over the Local 11 agreement." *Id.* at 834.

After the Board remanded the proceeding to the Region 2 Regional Director,[2] NLRB Hearing Officer Rachel Feinberg conducted a supplemental factual hearing at Region 2 in New York from May 22–26, 2017.

On December 13, 2018, more than 14 months after the parties submitted their post-hearing briefs, Regional Director John J. Walsh, Jr. issued a Supplemental Decision, once again granting NABET's request for unit clarification. *NBC Universal Inc.*, Case No. 02-UC-00625 (Dec. 13, 2018) ("Supplemental Decision"). Like the ARD's Initial UC Decision, the Regional Director's decision was again based on the erroneous conclusion that there existed a single, integrated, nationwide unit represented by NABET.

On January 31, 2019, NBCU filed a Request for Review of the Regional Director's Supplemental Decision. The Board issued a Decision on Review and Order Remanding on July 29, 2020, reversing the Regional Director's Supplemental Decision and dismissing NABET's petition. *NBC Universal Media*, 369 NLRB No. 134, 2020 WL 4366379 (July 29, 2020). The Board there clarified its standard for analyzing whether multiple units had merged into a single nationwide unit, and held that an "unequivocal manifestation of intent to merge" must be present in order to make such a finding, and such manifestation was absent in the case of NABET. *Id.* at 6-8. The Board accordingly reinstated and remanded the individual unit clarification petitions of Local 11, Local 41, and Local 53 for "appropriate action." *Id.* at 8.

After remand, on September 28, 2020, Regional Director Walsh issued a Notice and Order to Show Cause as to why the Region should not grant the Locals' unit clarification

[2] *NBC Universal, Inc.*, Case No. 02-CA-115732, 2017 WL 971647, at *2 (Mar. 7, 2017).

requests. The parties responded, and Regional Director Walsh issued a Second Supplemental Decision, granting the Locals' individual petitions without holding any additional hearing despite NBCU's request. *NBC Universal Inc.*, Case Nos. 02-UC-00619, 13-UC-000417, 31-UC-000323 (Apr. 1, 2021) ("Second Supplemental Decision").

II. Factual Background[3]

NBCU is a business with television, film, and cable operations throughout the country and world. (Initial UC Decision at 3, 16, 23.) The Company's local news operations at the Company's owned and operated stations are the subject of this proceeding. (*Id.* at 3.)

The NBCU/NABET collective bargaining relationship spans more than seventy years. (2011 Tr. at 80.) Since 1951, NBCU and NABET have negotiated a series of master collective bargaining agreements ("Master Agreement"). (Exs. J-1–18; *Nat'l Broad. Co.*, 114 NLRB No. 1, 3-4 (1955) ("NBC").) The Master Agreement is an umbrella agreement covering union-represented employees in multiple bargaining units for NBCU's broadcast operations including but not limited to its network news and sports business units, certain live and videotape entertainment programming, and parts of the Local Media Division. (Exs. J-1–18.) Of particular relevance here, the A Unit is the nationwide Engineering/technical unit whose responsibilities include, among other things, certain video shooting and editing. The H, M, and N Units are separate and distinct Newswriter Units in Chicago, Los Angeles, and New York, respectively. Throughout the parties' long bargaining relationships, the parties have agreed to various easements to and limitations on NABET's exclusive jurisdiction over various functions covered

[3] While NBCU has no issue with, and intends to, cite from the underlying record with respect to facts not in dispute (i.e., foundational facts and testimony and exhibits on bargaining history), NBCU is not waiving its right to assert that portions of the underlying factual record are inappropriate to be the basis for the ultimate decision to support a finding of a unit clarification (i.e., facts regarding the job functions of the Content Producer position) without further development of the relevant factual record.

by the separate bargaining units. As a result, not all video shooting, editing and newswriting functions performed at the New York, Chicago and Los Angeles owned and operated television stations remain within the exclusive jurisdiction of NABET. (Ex. J-1, Articles H, M, N).

News producer positions are outside the scope of the Master Agreement.[4] (2011 Tr. at 294, 553–54, 562–63, 775, 1031–32, 1282, 2841, 3172, 3249–50, Local 11 Submission to Office of Appeals, dated Aug. 12, 2010 at 3.) A producer will conceive a news story, research and develop it, determine who to interview, when and how to interview and film those interviewed, and supervise the writing, filming, and editing of a story. (2011 Tr. at 118–19, 173, 187, 350, 408, 449, 659–60, 780, 839–40, 944-45, 952–53, 1000, 1176, 1179, 1329, 1356, 1402, 1610–11, 1633–34, 1866–68, 1928–29, 2783–85, 2851-52, 2898, 2936, 2967–68, 3172–80, 3184–85, 3315, 3445, 3476-77, 3663.)

NBCU created the Content Producer position in an initiative to change the production of local news. (2011 Tr. at 355.) The Content Producer position is a producer position at its core. (2011 Tr. at 350.) Content Producers perform the non-NABET-represented work of conceiving, researching, developing and producing a story from start to finish. (2011 Tr. at 118–19, 168, 173, 187, 350–52, 364, 447–49, 455–59, 772–75, 846–47, 850–51, 952, 955, 1001, 1182–83, 1216, 1355, 1359–60, 1622–23, 1636, 1786–87, 2861, 3179–80.) Pursuant to the various provisions in the Master Agreement and along with other non-NABET represented employees, they also may do the additional tasks of non-linear editing, newswriting, and shooting with handheld digital cameras ancillary to the primary functions of the position and without having to join NABET. (2011 Tr. at 152, 350–51, 352, 952–53, 1001, 1182–83, 1216, 1335–36, 1355,

[4] The Master Agreement does however contain provisions addressing the parties' understanding if and when NBCU assigns producer duties to NABET-represented employees.

1359–60.) Finally, as noted above, the parties have agreed to various easements to and limitations on NABET's exclusive jurisdiction over various functions covered by the separate bargaining units, including with respect to video shooting, editing and newswriting functions performed at the New York, Chicago and Los Angeles owned and operated television stations. (Ex. J-1, Articles H, M, N).

Over the last decade, the nature of the work of the Content Producer has changed with the rapid progression of technology. For example, the "Nonstop" platform that was used to present stories early on when the position was formed is no longer in existence. The amount of time Content Producers spend performing certain tasks has consequently changed and some of the roles initially contemplated by the Content Producer model are not performed at all by some Content Producers. In fact, the role of the Content Producer is not consistent today across each of the stations and has developed separately as the workflows have evolved separately at the various stations. Further, the management structure overseeing the Content Producer position has evolved, with most of the decision makers involved in its creation no longer in place and with new management teams at each of the local stations where the Content Producers work.

ARGUMENT

I. THE BOARD MUST GRANT REVIEW AS THE REGIONAL DIRECTOR'S SECOND SUPPLEMENTAL DECISION PLACING CONTENT PRODUCERS IN A BARGAINING UNIT WITH WHICH THEY DO NOT SHARE A COMMUNITY OF INTEREST RAISES SUBSTANTIAL QUESTIONS OF LAW AND POLICY, IS A DEPARTURE FROM BOARD PRECEDENT, AND IS BASED ON CLEARLY ERRONEOUS FACTUAL FINDINGS

This matter clearly meets the standards under Rule 102.67 of the Board's Rules and Regulations for granting review of a Regional Director's representational decision.[5] As discussed in detail below: (i) the Regional Director has misapplied and departed from officially reported Board precedent; and (ii) the Regional Director's findings on substantial factual issues are clearly erroneous on the record and the errors prejudicially affect NBCU's rights.

As set forth below, the Second Supplemental Decision's conclusion errs in three significant ways. First, the Regional Director erroneously rejects the plain fact that Local 11's petition must be dismissed as Local 11 waived its right to represent Content Producers by virtue of a lawful *Briggs Indiana* agreement. The Regional Director, again erroneously, disposes of this fact in a footnote – wrongly noting that the Local 11 agreement sought to waive the right of the *national* Union. Second, the Regional Director erred in applying inapposite case law to save the Locals' deficient petitions, which attempt to clarify Content Producers into more than one

[5] Rule 102.67 provides that granting review is appropriate where:

> (1) That a substantial question of law or policy is raised because of:
>
> > (i) The absence of; or
> >
> > (ii) A departure from, officially reported Board precedent.
>
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

bargaining unit. Finally, though the above two points warrant complete dismissal of these petitions, the Regional Director wrongly rejected NBCU's alternative argument that, absent complete dismissal, the Local Petitions should either be: (i) severed and referred to their respective Regions of origin; or (ii) if retained by the Region, the record must be reopened.

The Board should, thus, grant review to address the proper standards for the unit clarification petitions in light of the Regional Director's clear legal and factual errors – particularly in that, as described further below, the Regional Director effectively ignored the Board's July 29, 2020 Decision that held there are multiple bargaining units represented by NABET at NBCU. Further, in doing so, the Regional Director's plainly departed from the Board's traditional unit clarification standard.

II. THE REGIONAL DIRECTOR ERRED IN GRANTING THE LOCAL PETITIONS BECAUSE THEY ARE INVALID ON THEIR FACE AND SHOULD BE DISMISSED

A. The Regional Director Departed From Board Precedent In Granting Local 11's Petition Because Local 11 Expressly Waived its Right to Represent Content Producers By Means of a Unit Clarification Petition.

As acknowledged in the Board's July 29, 2020 Decision, prior to the implementation of the Content Producer position in New York, NBCU and Local 11 agreed "that the New York content producers would *not* (absent an election) be represented by the Union, but that unit members hired into the content producer position *could choose* to keep their existing representation" ("Local 11 Agreement") (emphasis in original). 369 NLRB No. 134, 2020 WL 4366379, at *2, fn.1. The Local 11 Agreement constitutes a clear and express waiver of Local 11's ability to represent Content Producers in New York and to continue to pursue its petition in this matter. The Regional Director, however, departed from clearly-established Board precedent that a union may waive its right to represent a group of employees when he granted Local 11's petition. In doing so, he erred further by hinging his analysis on whether Local 11 had authority

to bind the international NABET union – which is, obviously, no longer the proper analysis with the Sector Petition dismissed.

The Board has long held that a union may waive its right to represent a group of employees. *Briggs Ind. Corp.*, 63 NLRB 1270 (1945); *Lexington Health Care Grp., LLC*, 328 NLRB 894 (1999). Here, the Local 11 Agreement states: "NABET-CWA agrees that it will make no claims to represent any non-NABET-represented Content Producers employed by WNBC **except in the event such employees elect NABET-CWA as their bargaining agent in an election supervised by the NLRB**." (Ex. E-10.) (emphasis added.) Local 11 has unquestionably completely waived its right to represent New York Content Producers in the absence of a supervised Board election.

The Regional Director in this regard plainly departed from Board precedent by interfering with and contravening the lawfully executed agreement between NBCU and Local 11. *See N. Pac. Sealcoating*, 309 NLRB 759, 760 (1992) (Board is "reluctant to permit parties to use Board processes in a manner contrary to their contractual commitments or obligations"); *Allis-Chalmers Mfg. Co.*, 179 NLRB 1, 3 (1969) (lending government sanction to undoing an agreement between the parties "would be at variance with Board precedent and contrary to the statutory policy directed toward stabilizing the collective-bargaining relationship").

In footnote 1 of the Second Supplemental Decision, the Regional Director wrongly relies on the Initial UC Decision which stated that Local 11 did not have the authority to waive NABET's right to represent the Content Producers.[6] The Sector Petition, however, is now

[6] Specifically, the Regional Director stated:

> "The Acting Regional Director previously found, based on the extensive record evidence, that Local 11 did not have the authority to waive NABET's right to represent the employees at issue. No decision by the Board or the United States Court of Appeals for the District of Columbia has disturbed that conclusion and, for the reasons given in the Acting Regional Director's Decision and Order dated October 26, 2011 ("2011 Decision") and the supplemental decision issued December

dismissed, rendering the Regional Director's analysis here irrelevant and mistaken. The question is no longer whether Local 11 had authority to bind NABET; the question now focuses on Local 11's own petition, and thereby, Local 11's agreement with NBCU, which expressly waives their right to represent Content Producers. The Regional Director at footnote 1 further states that no Board decision, or the decision from the U.S. Court of Appeals for the District of Columbia, has disturbed the conclusion that Local 11 did not have the authority to bind the international. The Board, however, did exactly that by stating that its "finding that there is not a single unit here renders irrelevant the question of whether the Local 11 Agreement is binding on the national Union." 369 NLRB No. 134, 2020 WL 4366379, at *10, fn.32. As the Board alluded to, the previous finding is simply a non-sequitur now that the Sector's petition is dismissed, and thus this finding has no further weight at all. A different result completely ignores the parties' intent and defies the plain language of the Local 11 Agreement, and moreover, significantly departs form Board precedent regarding *Briggs Indiana* agreements.[7]

13, 2018 ("Supplemental Decision"), I decline to do so now." Second Supplemental Decision at 2, fn.1.

[7] To the extent the Regional Director in his Second Supplemental Decision relies on his own *dicta* from the end of his 2018 Supplemental Decision that the Local 11 Agreement was not a stabilizing labor agreement which could bar a petition, this aspect of the decision completely misses the mark. Because contract bar principles act to bar a representation petition for employees *already covered* by a collective bargaining agreement, the factual situation here would not be appropriate for application of those principles given the Content Producers' status as non-represented employees. Thus, to be clear, NBCU does not argue that the Local 11 agreement was a "contract bar" to the Local 11 Petition. Instead, the appropriate analysis involves application of the waiver doctrine.

Indeed, contrary to the Regional Director's reliance on *dicta* from the Supplemental Decision, the Board has recognized that contract bar principles are distinct from a *Briggs-Indiana* waiver, which is present here. In *Lexington Health Care Group, LLC*, 328 NLRB 894, 896 (1999) the Board drew a clear distinction between *Briggs Indiana* and the contract bar doctrine:

> We do not believe that the *Briggs Indiana* principle rests solely, or even mainly, on contract bar policies. The contract bar policies are premised on the notion that a contract containing substantial terms and conditions of employment stabilizes the bargaining relationship. Therefore, for appropriate contractual periods, that relationship should not be disrupted by questions concerning representation. By contrast, the *Briggs Indiana* principle does not rest on these policies. Rather, it rests on the notion that a party should be held to its express promise.

As the Board further explained, "The Board's contract bar policies are essentially inapplicable to a *Briggs Indiana* promise not to seek representation. Such a promise is irrelevant to the goal of stability in giving effect to

B. The Regional Director Erroneously Relied on Inapplicable Precedent In Determining that the Local Petitions are Not Facially Deficient

Each of the Local Petitions are facially deficient under Section 102.65(a) of the Board's Rules as they do not specify the unit into which the Content Producers should be clarified. Rather, each Petition proposes that Content Producers should be clarified into two separate units. The Regional Director, however, continues to rely on a flawed analysis that, so long as the Content Producers perform work covered by the master collective bargaining agreement, they may be placed into some NABET bargaining unit. Second Supplemental Decision at 4-5. Based on this analysis, the Regional Director summarily placed Content Producers into the bargaining unit covered by Individual Article A with respect to the Locals. *Id.* at 8. This decision contradicts the plain text of the Board's Rules, and the Regional Director relies on two wholly inapplicable decisions to justify his circumvention.

Under Section 102.61(a) of the Board's Rules, a unit clarification petition must contain a description of the "bargaining ***unit*** which petitioner claims to be appropriate." 29 C.F.R. § 102.61(a)(4). "It is well established that unit clarification petitions are ***appropriate for resolving ambiguities*** regarding the unit placement of individuals who come within newly-established classifications." *Walt Disney Parks & Resorts U.S.*, 367 NLRB No. 80, 2019 WL 332267, at *3 (Jan. 25, 2019) (*citing Union Elec. Co.*, 217 NLRB 666, 667 (1975)) (emphasis added); *see also CHS, Inc.*, 355 NLRB 928 (2010) (same); *Marian Manor for Aged & Infirm, Inc.*, 333 NLRB 1084, 1094 (2001) (*citing P.J. Dick Contracting*, 290 NLRB 150 (1988)).

established, contractual terms and conditions of employment in the unit." Instead, the Board relies on the most basic of principles, "If there is such a promise, we will enforce it, for a party ought to be bound by its promise." *Id.* Local 11 made a promise. Accordingly, that promise should be enforced, and the Local 11 Petition should be dismissed.

The Local Petitions, as noted, are facially deficient in this regard (just as was the Sector Petition dismissed by the Board). Each Local Petition indicates that the single position of Content Producers be clarified into two totally different units and fails to specify the exact unit that is most appropriate, in each case. As acknowledged in the Board's July 29, 2020 Decision, the Content Producer position was formed by NBCU to entail "filming, editing, newswriting and exercising editorial control over . . . [editorial] content." 369 NLRB No. 134, 2020 WL 4366379, at *2. The position calls for a host of different job duties and assignments, including those of the Producer position that is non-union. Here, the Local Petitions ignore the reality of the actual tasks that any single Content Producer must perform, because they each improperly indicate that the Content Producer classification should somehow be clarified into two different units—the letter A Unit related to engineering/technical classifications and/or the Letter H, M or N Units for newswriters.

The Regional Director cites two decisions purportedly for the notion that a single group of employees may be clarified into two units. Both citations are misplaced. First, *Walt Disney World Co.*, 367 NLRB No. 80, 2019 WL 332267, presents a situation wholly distinct from the one here. *Walt Disney* involved two separate bargaining units – full-time and part-time employees – who had the same exact jobs. The only difference between the units was whether the employee was full-time or part-time. *Id.* at *1 ("[the employer and union] are parties to two collective-bargaining agreements, one covering all regular full-time employees and the other all regular part-time employees, who are employed by the Employer in specific job classifications listed in Addendum A of the collective-bargaining agreements"). The underlying UC petition involved a single type of job, and the question was whether *each* unit should be clarified to include that job. Here, by stark contrast, the question should be whether the Content Producers

might belong in the A unit or one of the local newswriter units. The answer, moreover, simply cannot be as the petitions seek: that they belong in both (and, of course, Employer maintains that they belong in neither).

Next, the Regional Director cites *Boeing Co.*, 349 NLRB 957 (2007), where he states that "the Board agreed to consider whether two separate bargaining units included [the subject employees]." Second Supplemental Decision at 3. *Boeing* is likewise entirely irrelevant to the case here. In that case, the employer was trying to remove the same job from multiple units. In other words, the Board does not require multiple petitions to include or remove the same position from multiple units. But here, the Union has argued that Content Producers might fit in to both the A Unit and at the same time one of the newswriter units without making a clear decision as to which unit the position allegedly belongs. That simply cannot be proper as it leads the Regional Director simply to combine all job functions once again (regardless of the actual bargaining unit) – as the Board expressly instructed him not to do.

To be clear, the technical classifications covered by the A Unit are very different than the newswriting functions performed by the positions covered by the respective H, M and N Units. Each unit has its own distinct duties and responsibilities, different supervisory structures, and in many instances, terms and conditions of employment. Dividing the Content Producer classification into two separate units as Petitioners propose would lead to unworkable results since different terms and conditions of employment would impact employees in the same classification, and there would be confusion with respect to which unit any particular Content Producer was a part given the combination of functions contemplated by those in that role.

Accordingly, the Board must grant review of the Regional Directors erroneous decision, and the Local Petitions should be dismissed since they are vague and do not correctly identify the

appropriate unit for clarification as required by the Board's Rules. Moreover, as this case wore on, it became clear that the Sector's petition was filed only to make the now-thoroughly-debunked and baseless argument that all of NABET's separate units under the parties' Master Agreement actually constituted a single, nationwide unit. That argument had a sole purpose: to allow NABET and the Regional Director to abuse and twist the rationale of the *Premcor* case to justify inclusion of a newly created classification that performed a mix of functions from different NABET units and from non-represented populations. Indeed, NABET did not so much as take a position at the hearing (and has not done so since) as to which individual unit would be appropriate if their nationwide unity theory failed (which it finally, and rightly, has). These factors resulted in a moving target against which NBCU had to litigate, fundamentally prejudicing the Company; prejudice that is exacerbated by the Region's refusal to permit further hearing once the case was narrowed to its appropriate scope when the Board announced the proper standards of law.

C. The Regional Director Erred in Refusing to Sever The Local Petitions and Refer Them to their Respective Regions of Origin, Absent Dismissal

If the Board affirms the Region's decision not to outright dismiss the Local Petitions, they should be severed and each of the separate petitions should be referred to the Region in which it originated. Specifically, the Board's Rules provide that "[s]uch petitions shall be filed with the Regional Director for the Region wherein the bargaining unit exists . . . ." 29 C.F.R. §§ 102.60(a), (b). Therefore, if the Local Petitions are not dismissed (which they should be), it is only appropriate for the Local Petitions to be severed and referred to Region 2 (Local 11 Petition), Region 13 (Local 41 Petition) and Region 31 (Local 53 Petition).

III. ABSENT DISMISSAL OF THE PETITIONS FOR FACIAL INVALIDITY, THE REGIONAL DIRECTOR ERRED IN CLARIFYING CONTENT PRODUCERS INTO THE "A UNIT"

A. The Regional Director Proceeds Under the Flawed Analysis Expressly Overturned by the Board

The fundamental holding of the Board's decision on July 29, 2020 was that, in the absence of an unequivocal intent to merge multiple units, there is no single, integrated, nationwide NABET unit at NBCU. 369 NLRB No. 134, 2020 WL 4366379, at *8. The Board, therefore, reinstated the petitions of the Locals and remanded them "for further *appropriate* action." *Id.* (emphasis added). The only appropriate, and logical, action, then, is to determine whether the Content Producers share a community of interest with any of the individual units.

The Regional Director, however, continued to proceed under the now-rejected analytical framework of a single bargaining unit. For example, the Regional Director – citing the 2011 decision from the Acting Regional Director – stated that "Content Producers in New York, Chicago, and Los Angeles performed work which, pursuant to the master collective bargaining agreement between the Employer and NABET, was covered by that agreement as unit work." Second Supplemental Decision at 4. This analysis is simply incorrect. It is based on the notion that there was a single bargaining unit – expressly overturned by the Board. It defies logic that the Regional Director could state that no subsequent Board decision "disturbed that conclusion." *Id.* Moreover, to say that the Employer has not objected to that finding is demonstrably false and at best constitutes an egregious misstatement by the Region. That has been the heart of this dispute for years. NBCU has consistently and forcefully argued that the Content Producers' functions did not constitute "unit work" as urged by NABET because there was no single, nationwide unit. NBCU's position was wholly vindicated by the Board in its July 2020 Decision. Moreover, while it is true that some of the functions of the Content Producer were

historically performed by members of the NABET A unit (e.g., shooting with cameras and editing), other functions were historically performed by members of the separate and distinct NABET newswriter units (e.g., newswriting), and still other functions were historically performed by non-represented employees (e.g., exercising producorial discretion to conceive of, develop and create news stories). In this regard, the Regional Director casts aside the clear mandate from the Board to look at the bargaining units separately.

The Regional Director, however, maintains the erroneous conclusion that "Content Producers perform the same basic functions as classifications in NABET-represented bargaining unit(s)." *Id.* at 6. It is abundantly clear that the Regional Director is still looking at whether Content Producers perform work from a perspective of the *combined* units, rather than performing a unit by unit comparison as the Board instructed. Indeed, the Regional Director notes that "[t]he cumulative effect of [the parties'] bargaining has been a blurring of distinctions between classifications covered by the different Individual Articles." *Id.* Here again, the Regional Director contravenes the Board's explicit findings made pursuant to a Court of Appeals remand. It simply does not matter that "most of the employees covered by the master collective bargaining agreement fall within Individual Article A." *Id.* The Regional Director has again effectively combined all of the bargaining units to form a body of work against which to compare the Content Producers. The Board declined to take that approach before, and must decline to do so again now.

The Regional Director attempts to buoy his erroneous conclusion by citing *Premcor*, predicting a situation where employers could move work out of bargaining units "by simply combining work from two or more bargaining units into a new classification." *Id.* at 4. In such a scenario, however, *Premcor* would simply be inapplicable, and the analysis would turn to

whether the new position shares a community of interests with a particular unit. If so, the new classification would be easily clarified back into one unit or the other.

Moreover, *Premcor* itself provides support for NBCU's position. In a portion excerpted by the Regional Director, the Board held that "[o]nce it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as remaining in the unit[.]" 333 NLRB 1365, 1366 (2001) (emphasis added). The Region has never once stated that the Content Producers are solely performing the same basic functions of any single unit. Instead, the Region has arbitrarily and without the support of Board law decreed the A Unit as the target unit without ever properly reckoning with the undisputed facts that the Content Producer position performs a variety of functions that have historically been performed by both nonrepresented employees and employees from separate and distinct bargaining units.

B. The Regional Director Has Erred In Clarifying Content Producers Into the "A Unit" By Wrongly Relying on Past Evidence and By Failing to Conduct a Community of Interest Analysis

Relying on this apparent conclusion that the Content Producers do work performed generally across the bargaining units, the Regional Director summarily places them into the A Unit, presumably based on his conclusion "that most of the employees covered by the master collective bargaining agreement fall within Individual Article A." Second Supplemental Decision at 6. That is simply not the proper analysis. As described further below, the Regional Director should have: (1) performed his own independent analysis of whether Content Producers perform the same essential functions as any single unit, rather than relying on past flawed decisions that analyzed the nonexistent nationwide NABET unit; and (2) because Content Producers *do not* perform the same essential functions as any one unit, the Regional Director

should have conducted a detailed community of interest analysis. By not performing these two steps, the Regional Director has clearly erred.

Under *Premcor*, a unit will be clarified if the new job has the same essential functions of the bargaining unit. As described above, however, the Regional Director has simply repeated the same flawed analysis that Content Producers are performing the same essential functions of the nonexistent, nationwide NABET unit. In doing so, the Regional Director has looked at all of the work performed under the *Master Agreement*, and concludes that because the Content Producers perform work arising under the Master Agreement, they can be clarified under *Premcor*. Second Supplemental Decision at 4 (citing the Initial UC Decision).

The Regional Director, however, never cites anything from the record, or points to actual work done by the A Unit that is essentially the same as work performed by the Content Producers. It is, of course, hard to fault the Regional Director for not citing to the record, because none of the Locals, nor NABET, argued or offered evidence into the record that the Content Producers must be clarified into the A Unit. In the absence of any such evidence, the Regional Director instead relies on a flawed *Premcor* analysis – effectively offering the evidence that NABET never did – without performing a new analysis necessary in light of the Board's July 2020 decision. That is clearly erroneous.

Under *Premcor*, the first question is whether a new classification is performing the same essential functions as a unit classification. Instead of relying on past flawed decisions (flawed both in their analysis and in that they rely on a different set of facts than is now applicable), the Regional Director should have performed a detailed analysis to determine whether the Content Producers perform the same essential functions of *either* the A Unit or one of the newswriter units. With the exception of summarily and wrongly holding that the Content Producers belong

in the A unit, the Regional Director has never determined that Content Producers performed the same work of any specific unit.

Such a determination would be impossible, of course, because the core of the Content Producer function is non-union producing work as well as the work performed by employees in the various NABET units, including newswriting, editing, and photography.[8]

Accordingly – since the Content Producers do not perform the same essential functions as any one unit – the question becomes whether they share a community of interest. By not performing such an analysis – and notably, such an analysis has *never* been performed in this case – the Regional Director erred. Of course, such an analysis would also require new factual development, as described further below.

The Regional Director's apparent reliance on the now-overturned notion of looking at the work of the bargaining units as a whole was clear error and must be overturned. The Regional Director is repeating the *same* mistake in his Second Supplemental Decision that was rejected by the Board. Moreover, the Locals need to state exactly which unit to which the Content Producer position should be clarified, and then prove that the Content Producers share an overwhelming community of interest with the employees of that unit. *See, e.g.*, *At Wall Co.*, 361 NLRB 695, 697-98 (2014) (overturning Regional Director's decision applying *Premcor*, and applying a community of interest analysis); *id.* at 698 ("Having found that the petitioned-for employees are not already part of the unit under *Premcor*, supra, we will apply the Board's accretion analysis and determine whether the [subject] employees should be added to the unit because they have

[8] In fact, in 2011, multiple Company and Union witnesses testified that the Content Producers in each city and union-represented personnel in the A, H, M, and N units have separate supervision. (2011 Tr. at 344, 658, 845–46, 955, 2038, 2533, 2806, 2858, 3021, 3101, 3118.) There is also substantial evidence in the record that the union-represented photographers, editors, and newswriters do not carry the same editorial responsibilities and control as the content producers and therefore are not by any means similar to them or interchangeable with them. (2011 Tr. at 293, 330, 352, 364, 772–75, 850–51, 955, 1622, 1636, 1765–66, 1786–87, 1805–09, 2861, 3179–80.)

little or no separate identity and share an overwhelming community of interest with the preexisting unit").

C. If The Local Petitions are Not Dismissed or Severed, The Region Cannot Rely on Factual Conclusions From the Prior Regional Director Decisions and Must Reopen the Record

After more than *eleven years* have passed since the Local Petitions were first filed, the Regional Director cannot rely on factual and legal conclusions from prior decisions of the Regional Director for any purposes with respect to the Local Petitions.[9] In short, the facts and circumstances surrounding those decisions have materially changed, and the Regional Director clearly erred in rejecting NBCU's request to reopen the record (as an alternative to dismissal).

Pursuant to Section 102.65 (e)(1) of the Board's Rules, the Region may permit rehearing of issues based on newly acquired evidence. 29 C.F.R. § 102.65(e)(1). "A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited." *Id.* The Regional Director wrongly denied NBCU's request to reopen the record, absent dismissal, and erred by relying on past factual findings from a time when this case was entirely focused on the issues regarding a nationwide bargaining unit. It is incredibly prejudicial to decide this case on those facts, without at least allowing the record to develop as between NBCU and the Locals – whose petitions have been on the backburner since the Sector filed its own petition in December 2010.

[9] Although the Regional Director Decisions' legal and factual conclusions cannot be cited for any purpose, the underlying record can be cited with respect to those matters that have not changed (i.e., matters concerning bargaining history with respect to the relevant contract language).

The Board has an established practice of permitting further hearing and litigation to consider evidence of changed circumstances. *HeartShare Human Servs. of N.Y., Inc.*, 320 NLRB 1 (1995) (pursuant to an Order of the Board, the record in the representation case was reopened to receive evidence of changed circumstances and the Board subsequently gave consideration to such additional evidence), *review denied, enf. granted*, *NLRB v. HeartShare Human Servs. of N.Y., Inc.*, 108 F.3d 467 (2d Cir. 1997); *see also Charlotte Amphitheatre Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996) (noting the Board must give consideration to changed circumstances "[n]or is this the whim of just one circuit; all but one of those that have considered the issue agree that changed circumstances, such as the passage of time or turnover in the work force, are relevant to the Board's decision to issue a bargaining order.); *NLRB v. Cell Agricultural Mfg. Co.*, 41 F.3d 389 (8th Cir. 1994) (noting that the Board erred by failing to carefully weigh evidence relating to changed circumstances in issuing a bargaining order); *Metropolitan Life Ins. Co.*, 156 NLRB 1408 (1966) (reexamining the appropriateness of a bargaining unit on remand where evidence of changed circumstances reflected structural changes in the unit since the original decision and direction of election); *Sumo Container Station, Inc.*, 337 NLRB No. 171, 2002 WL 1860001 (Aug. 1, 2002) (ordering a new hearing where changed circumstances, namely the cessation of operations, had not been considered during the original unfair labor practice hearing); *Mich. Bell Telephone Co.*, 216 NLRB 806, 807 (1975) (noting that the Board denied a motion for summary judgment and ordered a new hearing for the purpose of "adducing evidence concerning Respondent's contentions that changed circumstances since the representation hearing" rendered an office inappropriate for bargaining).

The Regional Director appeared to reject these cases because they were representation cases, rather than unit clarification cases. Second Supplemental Decision at 5. To avoid any

doubt, the Board routinely reopens the record in unit clarification cases as well, including doing so in *Boeing Co.*, cited by the Regional Director elsewhere in his Second Supplemental Decision. *Boeing Co.*, 349 NLRB 957 (2007) (remanding case to Regional director for further processing, including reopening the hearing); *Black Hills Energy*, Case No. 27-UC-000229, 2011 WL 3797900, at *1 (N.L.R.B. Aug. 26, 2011) (remanding unit clarification case to Regional Director to reopen the record and take evidence regarding "what duties [newly hired employees] actually perform, and any other evidence relevant to the merits of the unit clarification issue. Based on that additional evidence and the entirety of the record, the Regional Director shall determine whether the Employer-Petitioner's petition for unit clarification should be granted"). *Black Hills Energy* is particularly instructive. As the Board noted, "[w]hen the Regional Director processed this petition, the Employer-Petitioner had only hired 1 employee of the anticipated 16 employees in only 1 of the 4 classifications designated for the new [] facility." *Id.* The Employer noted at the hearing that the remaining fifteen positions were to be filled by January 2011. By the time the Board ordered the record reopened, the new employees had been on the job for nearly eight months. *Id.* Reopening was warranted, then, to receive evidence about the duties the new employees performed. *Id.* Only then, according to the Board, could the Regional Director rule on the merits of the petition for unit clarification; after hearing actual, up-to-date evidence in light of the changed circumstances. *See id.*

The Regional Director, in rejecting NBCU's arguments in this regard, again summarily concludes that "the question of whether the Union represents the Content Producers has already been decided in the affirmative." Second Supplemental Decision at 5. This again is another incredible and demonstrably incorrect misstatement by the Region. It is entirely unclear where and when that question has been decided. To the extent the Regional Director relies on the

factual record to date, NBCU respectfully submits, for the reasons below, that he has committed a prejudicial error.

1. NABET's Pursuit of a Clearly Erroneous Theory for Over a Decade Disrupted the Unit Clarification Determination and Prejudiced NBCU.

For the vast majority of the eleven years since the Local Petitions were filed, NABET pursued an invalid theory that it represented one nationwide unit under the terms of the parties' Master Agreement even though there was no clear manifestation of the parties' intent to merge bargaining units, as required by Board law. Throughout their long and well-established seventy-plus year bargaining relationship, NBCU and NABET have consistently recognized that the work of "producers" is not covered by the parties' Master Agreement. The Board's July 29, 2020 Decision finally put to rest years long misapplication of the law by NABET and prior Regional Director decisions. As a result, for years, the parties have been engulfed in on-going litigation on an issue that was clearly misinterpreted, and thus, the hearing records were inevitably focused on this flawed interpretation. Accordingly, it would certainly be prejudicial to allow the Region to depend on prior hearing records without providing NBCU an opportunity to present new evidence.

2. The Regions Must Consider New Facts and Evidence to Determine Unit Clarification Issues.

The record as it exists currently is based on the duties of the Content Producers when the position was newly formed. To state the obvious, nothing remains the same for eleven years. Thus, it would be completely inappropriate to rely upon facts that no longer apply to the position. *See Black Hills Energy*, 2011 WL 3797900, at *1 (remanding UC case to reopen record and take evidence about newly hired employees' job duties and functions); *see also Risdon Mfg. Co.*, 195 NLRB 579, 582 (1972) (ordering record reopened, in part because of personnel changes, "for the purpose of taking testimony with respect to changes which have occurred in the Aerosol Division

since the original hearing and how such changes have affected the appropriateness of the Aerosol Division unit").

Significantly, several Union witnesses from the 2011 hearing are no longer employed by NBCU as Content Producers, and thus, the record is almost entirely based on the description of work of Content Producers by individuals who no longer perform the work in its current state. Consequently, if further hearing is not conducted, the Section 7 rights of current employees will be adversely impacted by the testimony of former employees who have no involvement in the current work or employees who are still currently employed but in different roles which are unrelated to the Content Center workflow.

Furthermore, there are several factual developments since the filing of the Local Petitions that warrant relitigation to allow NBCU to present new evidence that was not available at the time the Local Petitions were filed. Specifically:

- The work of the Content Producer position has changed in the eleven years since its inception. The position has evolved over time and the application of the position in three different cities (New York, Chicago, Los Angeles) has also varied based on significant turnover in those holding the job and the supervisors overseeing the work.
- Management structures are different –a number of critical decision-makers relating to the Content Center model and Content Producer role at the owned and operated stations have changed. In turn, there have been material changes in the way the work has been assigned to Content Producers and performed by them over the course of a decade.

- This evolution in the Content Producer role has also coincided with ever changing technology and news cycle, including the distribution of content on various new platforms via the internet, social media, and TV streaming. Indeed, many of those platforms either did not exist at the time of the original 2011 hearing or in any event played little to no role in the Content Center model at that time. The current landscape which entails a constantly changing and "24-hour" style news cycle, a substantial increase in news events coupled with rapid breaking news is drastically different than in 2009. For example, the Nonstop Platform that was described by witnesses and *new* at the time of the 2011 hearing is no longer in existence. Thus, as a result of the necessity to distribute content over even more forms of new media, the current duties and responsibilities of the Content Producer position are materially different than those envisioned when the position was first formulated in 2008 to 2009. A vast change of technology and media in the course of over a decade warrants further hearing to discuss the resulting differences in the job duties and responsibilities of the classification, the time it takes to perform certain tasks over others, and to determine into which unit, if any, is appropriate to clarify the Content Producer position. The evidence of the changing landscape of news content creation and reporting as it relates to the functions of the Content Producer position was obviously not available at the time the Petitions were filed.

Any differences in the work that the Content Producers perform and the amount of time they spend performing certain tasks will impact the clarification analysis. NBCU should be given the opportunity to present this new evidence that has been gathered over the course of ten

years. There can be no valid unit clarification determination without consideration of the current work performed by the Content Producer position and whether it is consistent with the units as proposed in the Local Petitions (which it is not).

Therefore, absent dismissal of the Local Petitions (as discussed above), past decisions cannot be relied upon because changed circumstances along with the passage of time necessitates further hearing and litigation of the clarification questions in light of the Board's July 29, 2020 Decision.

CONCLUSION

For the foregoing reasons, NBCU respectfully submits that the Board should grant review of the Regional Director's Second Supplemental decision in this matter pursuant to Rule 102.67.

Dated: April 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael J. Lebowich, an attorney, hereby certify that on April 30, 2021, I caused a true and complete copy of NBCUniversal Media, LLC's Request For Review to be served via electronic filing and/or electronic mail, as indicated below, upon the following persons:

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